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VIA HAND DELIVERY

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EX PARTE

Mr. William F. Caton Acting Secretary Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554

FEB 2 0 2002

PERETAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Notification of Ex Parte Communication in ET Docket 98-206 RM-9147; RM-9245; Applications of Broadwave USA et al., PDC Broadband Corporation, and Satellite Receivers, Ltd., to provide a fixed service in the 12.2-12.7 GHz Band; Requests of Broadwave USA et al. (DA 99-494), PDC Broadband Corporation (DA 00-1841), and Satellite Receivers, Ltd. (DA 00-2134) for Waiver of Part 101 Rules.

Dear Mr. Caton:

On February 19, 2002, Sophia Collier and Antoinette Cook Bush of Northpoint Technology, Ltd. ("Northpoint") met with Paul Margie, Legal Advisor to Commissioner Copps. The purpose of the meeting was to discuss the pending license applications of Northpoint's Broadwave USA affiliates to provide terrestrial service in the 12.2-12.7 GHz frequency band. Northpoint repeated its request that the Commission grant its pending applications (and associated waiver requests) without an auction.

The attached presentation, which was distributed at the meeting, summarizes the main points discussed. In addition, Northpoint reiterated its position that it is the only applicant qualified for a terrestrial license in the 12.2-12.7 GHz band because only it successfully completed the independent technical demonstration mandated by statute and carried out on the Commission's behalf by the MITRE Corporation. Northpoint also discussed the fact that Section 309(j) of the Communications Act only requires auctions if the FCC accepts for filing mutually exclusive applications. It was noted that the FCC frequently establishes procedures that enable applicants to avoid mutual exclusivity, most frequently in the satellite licensing context, but also in the case of many terrestrial applicants. Northpoint noted, too, that the Commission has failed in its previous attempts to create competition to cable TV through the use of competitive bidding for licenses.

Also attached to this filing is a one-page excerpt from Northpoint's March 12, 2001, Comments in which Northpoint confirms its readiness to provide consumers access to their local television stations using the same must-carry regime applicable to cable

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television operators. Northpoint is eager to rebroadcast all local television stations in every local market and is prepared to comply with the Commission's must-carry/retransmission consent system in order to be able to do so.

Eighteen copies of this letter are enclosed – two for inclusion in each of the above-referenced files. Please contact me if you have any questions.

Yours sincerely,

J.C. Rozendaa

Counsel for Northpoint Technology, Ltd.

attachments

CERTIFICATE OF SERVICE

I, Shonn Dyer, hereby certify that on this 20th day of February, 2002, copies of the foregoing were served by hand delivery* and/or first class United States mail, postage prepaid, on the following:

William F. Caton*
Acting Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-B204
Washington, D.C. 20554

Paul Margie, Spectrum & International Legal Advisor* Office of Commissioner Copps Federal Communications Commission 445 12th Street, SW Washington, D.C. 20554

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Shonn Oyer

Recent Supreme Court and D.C. Circuit Decisions Support the Conclusion that the ORBIT Act Prohibits Auctions in the 12.2 – 12.7 GHz Band

- The ORBIT Act clearly prohibits auctions of "spectrum used for the provision of international or global satellite communication services."
- The D.C. Circuit in the *NPR* case stated that when a statute made a distinction between the "nature of the station" and the "part of the spectrum" the FCC must honor that distinction.
 - ORBIT clearly identified a "part of the spectrum" not a "station"
- The Supreme Court in the *Pole Attachment* case affirmed that the FCC is required to apply the literal words of the law when the law distinguishes between "who" and "what" -- a character that does not change "whether or not it does other things as well."
 - Text from case: "Because "by" limits pole attachments by who is doing the attaching, not by what is attached, an attachment by a "cable television system" is an attachment "by" that system whether or not it does other things as well."
 - Thus, once "spectrum" is used "for" the provision of international of global satellite systems, it may not ever be auctioned, regardless of "whether or not it does other things as well."

Prior to Northpoint the FCC Did Not Consider Ubiquitous Satellite-Terrestrial Sharing Possible

FCC Statements on Satellite-Terrestrial Sharing					
1983	"fixed services and DBS services cannot use the same frequencies in a geographic area due to interference"	12.2 – 12.7 GHz			
1983	"not possible"	11 GHz			
1996	"not feasible at this time"	18 GHz			
1997	"could cause harmful interference"	28 – 31 GHz			
1998	"not currently feasible"	37, 48, 51 GHz			
1999	"will not be able to share"	39 GHz			

- Northpoint invented a new technology that allowed terrestrial services to share with satellites and has spent eight years at the FCC (443 filings) seeking approval to offer its technology to the public.
- Based on Northpoint's record, <u>and only on Northpoint's record</u>, in November 2000, the FCC concluded for the first time ever that "sharing was feasible" between ubiquitous satellite and terrestrial systems.

Northpoint Seeks to Use Its Technology to Create a New Nationwide Competitor to Cable and DBS

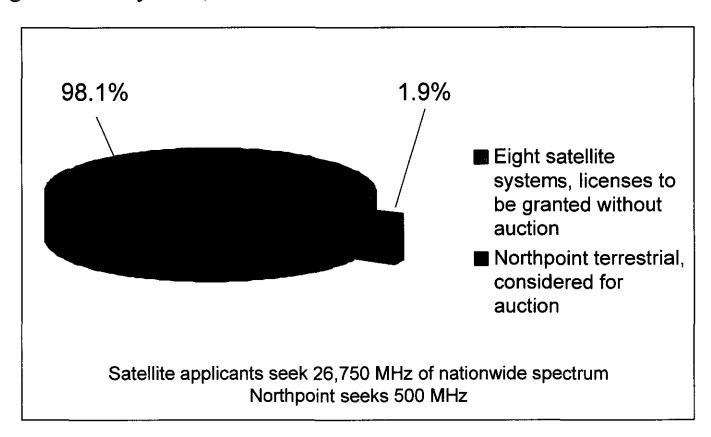
- Competitive consumer services
 - Multi-channel video programming
 - Local signals
 - High-speed internet
 - New technologies
 - Price competition
- Keys to competitive success
 - Low-cost infrastructure enables price competition, broad deployment including rural areas
 - Ability to use existing consumer equipment; program access
 - National brand
 - Licenses for affiliates to operate nationwide

Timeline - Northpoint Has Been Seeking FCC Authorization for Eight Years

- 1994: Northpoint first brought its technology to the FCC.
- 1997: Northpoint was granted first experimental license.
- 1998: Both Northpoint and Skybridge, a satellite system, file Petitions for Rulemaking seeking to use the same band. The FCC consolidated the Petitions and called for satellite, <u>but not terrestrial applications</u>.
- 2000: Commission Order states all parties could share spectrum.
 - Established process to grant licenses to NGSO satellite applications; sought comment on auction for terrestrial use.
 - Congress establishes "MITRE" independent testing requirement.
- 2001: Northpoint only company to submit equipment and pass test.

Northpoint Seeks Parity With Co-Applicants

• Northpoint's Broadwave affiliates applied for a license on the same day as eight satellite systems, all of whom will be licensed without auction.

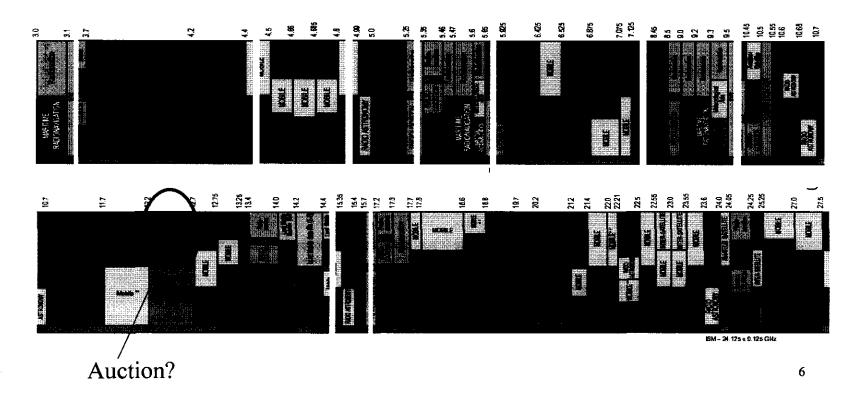


Northpoint Seeks Parity With DBS Operators

- When the DBS service was established, all DBS licenses were issued without auction.
 - DBS is currently using 5,800 MHz of spectrum capacity granted to it without auction.
 - DirecTV has never participated in an auction.
 - The two slots that were auctioned in 1996 were anomalies and the Commission has returned to its no-auction policy for DBS operators with its August 2001 Ka-Band grants.
 - Notably Pegasus, DirecTV's largest distributor who has advocated an auction for Northpoint was given five nationwide licenses in the Ka-Band *without an auction*. Hughes Electronics, parent of DirecTV, got eight nationwide licenses, again without an auction.

Northpoint Seeks Parity With Other Microwave Operators

- The FCC has <u>never conducted a single auction</u> for any ground based license in the spectrum band 3 27 GHz (42,770 microwave licenses have been issued without auction since 1993 when the FCC obtained auction authority).
- Why would the Commission choose to single out for auction the one band where a company created its own bandwidth through a new technology?



2001 Licensing Actions - FCC Decisions on When to Auction or Not Auction Seem Arbitrary

- <u>Satellite systems</u>: Aug. 2001: 11 companies granted 66,000 MHz of spectrum without auction. No assertion that ORBIT prohibited auction. Licenses given to Hughes, Pegasus, Echostar, et al.
- <u>Hybrid systems</u>: Dec 2001: Boeing given blanket license to operate Connexion system. No "service" created. No call for competing applications. No auction. License granted in less than a year through a "waiver" in a spectrum band where a rulemaking was being conducted for other services!
- <u>Ground based wireless licenses</u>: Over 11,000 granted in 2001 without auction, primarily to large commercial telecommunications companies such as Nextel, AT&T Wireless, Verizon, et al.
- <u>Cable Relay Licenses</u>: All licenses granted without auction in 2001.
- Northpoint: Seeks license to operate using 500 MHz of spectrum capacity created through its own technology.
 - Auction considered. Will share with the eight systems with whom it applied on the same day, sharing the very same spectrum, offering the same or similar services that will not be subject to auction.

Auctions Are Discretionary; Not Mandatory

- As the FCC licensing activity demonstrates, the Commission can easily grant licenses without an auction when it chooses to do so.
- No law requires an auction for Northpoint.
- Auctions have significant legal impediments in this case.
 - Lack of mutual exclusivity
 - Patents
 - Local TV Act requires independent testing; FCC risks "1498 taking" if testing infringes NP patents
 - Procedural fairness (disparity treatment of similarly situated applicants)
 - ORBIT Act

Review of 2001 Auction Results

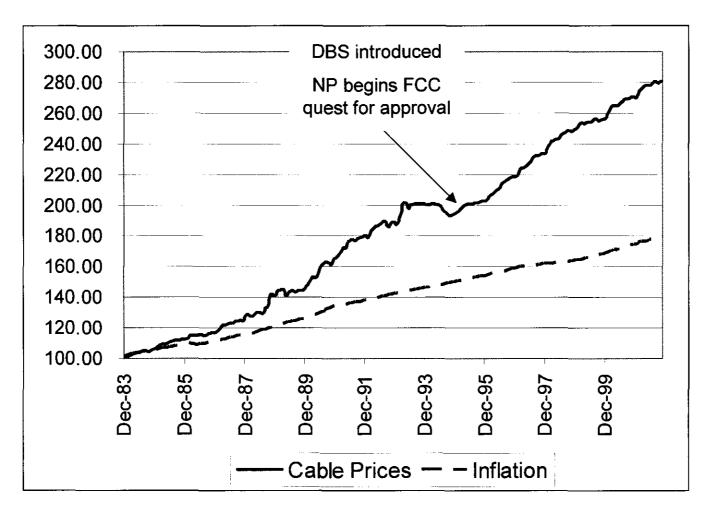
Number	Auction Description	Licenses offered	Licenses sold	Proceeds	% sold
35	NextWave Re-auction	422	0	\$ -	0%
38	700 Guard Band	8	8	21.0	100%
39	VHF Location Monitoring	257	217	1.1	84%
40	Paging	15,514	5,323	12.9	34%
41	Narrowband PCS	365	317	8.3	87%
42	Multiple Address System	5,104	878	1.2	17%
	Total	21,670	6,743	\$ 44.5	31%

Listing of the results of all auctions performed in 2001

Source: FCC website

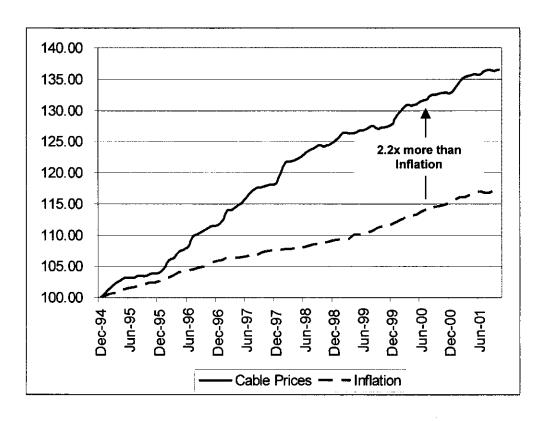
(http://wireless.fcc.gov/auctions/summary.html)

Multi-channel Video Market Is Ready for Price Competition



Source: Monthly Cable CPI, Bureau of Labor Statistics

Increase in Cable Prices Since 1994



Cable prices have risen 37% while NP has been seeking FCC approval...

\$15.8 billion more per year in total charges than is justified by inflation...

Overcharges average \$230 per year for each cable subscriber.

Northpoint's Broadwave affiliates could provide immediate price competition where it is currently lacking.

Disparate Processing Prejudiced Northpoint and All Future MVDDS Applicants

- Failure to call for terrestrial applicants at the same time as satellite applicants prevented the Commission from knowing the full universe of terrestrial applicants and affording them equal treatment with NGSO applicants.
- Prejudiced Northpoint and all future innovative terrestrial applicants
 - 3,250 MHz allocated for NGSO; 500 MHz for new terrestrial
 - "Sharing budget" disproportionately allocated to NGSO
 - Terrestrial operator's technical options for terrestrial-terrestrial sharing have been foreclosed by Commission actions taken solely to accommodate all eight NGSO applicants.

As to the specific licenses that it wants granted, Northpoint recognizes that these do have to be defined with some precision. Northpoint supports the Commission's proposal to issue licenses on the basis of Nielsen's Designated Market Areas ("DMAs"). Those geographic markets are well suited to the low-power character of Northpoint's technology (essential to avoid interference with existing users) and the must-carry obligations that Northpoint is eager to assume in tailoring services to the individual communities its affiliates will serve. 84

Northpoint likewise supports the issuance of one spectrum block of 500 MHz per service area. She has already noted, without the use of advanced compression techniques, and allowing capacity to be available for other services such as high-speed Internet service, the Northpoint technology can provide approximately 96 video channels using the 500 MHz of spectrum in the 12.2-12.7 GHz band. A smaller block of spectrum would cripple any effort by terrestrial broadcasters in the 12 GHz band to compete with local cable and DBS operators that routinely provide hundreds of channels to subscribers. Because smaller blocks of spectrum would not enable a commercially viable service, the use of smaller blocks would not promote the objectives of section 309(j)(4)(C) or the public interest. Northpoint also agrees with the

 $^{^{83}}$ See First Report and Order and FNPRM $\P\P$ 284-286.

⁸⁴ See id. ¶ 292; see also Reauthorization of the Satellite Home Viewer Act: Hearing Before the Subcomm. On Telecommunications, Trade, and Consumer Protection of the House Comm. On Commerce, 106th Cong., 1st Sess. 50 (1999) (statement of Sophia Collier, President and CEO of Northpoint Technology) ("We will comply with full must-carry and retransmission consent in the very same manner as the cable companies do.").

⁸⁵ See id. ¶ 288.

 $^{^{86}}$ See id. \P 289.